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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/820,488	04/08/2004	Marina Shereshevsky	0162-1	7402
25901	7590	07/02/2009	EXAMINER	
ERNEST D. BUFF			WONG, LESLIE A	
ERNEST D. BUFF AND ASSOCIATES, LLC.			ART UNIT	PAPER NUMBER
231 SOMERVILLE ROAD			1794	
BEDMINSTER, NJ 07921				
MAIL DATE		DELIVERY MODE		
07/02/2009		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/820,488	<b>Applicant(s)</b> SHERESHEVSKY, MARINA
	<b>Examiner</b> Leslie Wong	<b>Art Unit</b> 1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
  - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
  - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED. (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 13 March 2009.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1,3,5-7,10,11,13-15 and 18 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1,3,5-7,10,11,13-15 and 18 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.  
 Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
 Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:  
 1. Certified copies of the priority documents have been received.  
 2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)  
 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)  
 3) Information Disclosure Statement(s) (PTO/SB/08)  
 Paper No(s)/Mail Date \_\_\_\_\_
- 4) Interview Summary (PTO-413)  
 Paper No(s)/Mail Date \_\_\_\_\_
- 5) Notice of Informal Patent Application  
 6) Other: \_\_\_\_\_

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1, 3, 5-7, 10, 11, 13-15, and 18 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

Applicant does not teach active cultures in the absence of Lactobacillus acidophilus.

With respect to claims 5 and 13, it is repeated that Applicant does not teach soy in combination with milk. The specification teaches soy or milk based (see pages 15 and 18).

Applicant's arguments filed March 13, 2009 have been fully considered but they are not persuasive.

Applicant argues that the description does not preclude the use of a soy based yogurt containing milk proteins.

Applicant refers to page 15 of the specification, but the specification does not teach the combination of soy and milk proteins.

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The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 3, 5-7, 10, 11, 13-15, and 18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hara (JP 61231958), Kazutada et al (JP 55007013), Masahiro et al (JP 3112454), and Oliver (GB 2294625) in view of JP 56113257, JP 59166035, Ariyama (US 3096177), and newly cited Kamarei et al (US 6030650).

Hara (JP 61231958) disclose a yogurt comprising vegetable (see abstract).

Kazutada et al (JP 55007013) disclose a yogurt comprising vegetables (see abstract).

Masahiro et al (JP 3112454) disclose yogurt comprising vegetables (see abstract).

Oliver (GB 2294625) discloses a yogurt comprising vegetables such as tomatoes, carrots, corn, and potatoes and their purees (see entire document, especially pages 1 and 3).

The claims differ as to the use of soy and the recitation of specific cultures, percents, and a cooling step.

JP 56113257 discloses yogurt made from soybeans (see abstract). JP 56113257 also discloses the combination of soy and dairy milk.

JP 59166035 discloses a vegetable yogurt (see abstract).

Ariyama (US 3096177) discloses a soy yogurt (see entire patent).

The disclosed yogurt cultures are notoriously well-known in the art and used for their art-recognized purpose. Silva et al disclose *Lactobacillus acidophilus* as conventional in yogurt production (see claim 111). Kamarei et al disclose the use of *Lactobacillus acidophilus*, *Lactobacillus casei*, *Lactobacillus reuteri*, and *Bifidobacterium bifidum* in yogurt (see entire patent, especially column 5, line 49 to column 6, line 34)

In the absence of a showing to the contrary, the amounts claimed are seen to be no more than a matter of choice, dictated by preference, and well-within the skill of the art.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use soy or soy and milk, conventional yogurt cultures, and the claimed percents in that of Hara (JP 61231958), Kazutada et al (JP 55007013), Masahiro et al (JP 3112454), or Oliver (GB 2294625) because the use of soy, conventional cultures, and preferred amounts is well-within the skill of the art.

Once the art has recognized the addition of vegetable products to yogurt the use and manipulation of types of vegetables and percents employed is merely a matter of choice and well-within the skill of the art.

Applicant's arguments filed March 13, 2009 have been fully considered but they are not persuasive.

Applicant argues that the prior art does not disclose using cooked vegetables; pureeing cold vegetables to yield a cold puree; the cold cooked pureed vegetables ranging from 40 to 60 percent by weight; no artificial additives or preservatives;

vegetables remaining unfermented; yogurt based on soy proteins; and yogurt containing active cultures.

It is noted that once removed from heat, the cooling process of a vegetable is inherent. It is further noted that the immediate cooling of products to prevent overcooking is conventional. Applicant does not define the cooling step nor define a cooled temperature. It is further noted that both additives and preservatives are optional ingredients in the food art. The decision to use or not use both additives and preservatives is merely a matter of choice and dependent on personal preference.

In the absence of unexpected results, the use and manipulation of vegetables and percents is well-within the skill of the art and merely a matter of choice.

The prior art clearly teaches the addition of vegetables to yogurt as is claimed. In the absence of a showing to the contrary, Applicant is using known components to obtain no more than expected results.

Applicant is using known components to obtain expected results. There is nothing patentable unless the applicant, by a proper showing, further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected, and useful function. It is not seen where Applicant has provided support for unexpected results. In the absence of a showing of unexpected results, the amounts claimed are merely a matter of choice and well within the skill of the art. At most the amounts are seen merely as optimization, see *In re Boesch* 205 USPQ 215.

In the absence of unexpected results, it is not seen how the claimed invention differs from the teachings of the prior art. Applicant's claims are drawn to a combination

of known components which produces expected results, see *In re Kerkhoven* 205 USPQ 1069 and *In re Gershon* 152 USPQ 602.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is (571)272-1411. The examiner can normally be reached on Tuesday to Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Leslie Wong/  
Primary Examiner, Art Unit 1794

LAW  
June 30, 2009